case, however, there is no evidence whatsoever of any species of imposition having been practised by the debtor upon the respondents as execution creditors, whereby they were unfairly delayed and deprived of their rights. Nor is there an iota of evidence that they were otherwise unfairly kept out of their money. The money was in court all the time, and if they were not diligent enough to take steps to have it paid out to them earlier they have only themselves to blame. In the circumstances I feel that it would be wrong for this court to exercise any discretion in favour of the respondents.

For the reasons I have stated I would make the declaration asked for on the motion and an order that the respondents do pay to the official assignee the money received by them. They must also pay the costs of these proceedings in proportion to the amounts received by them.

Order accordingly.

Solicitors: *Shearn, Delamore & Co.; Gibb & Co.*

SUNDRAM v. CHEW CHOO KHOON

[O.C.J. (Pawan Ahmad J.) March 24, 1969]

[Ipoh — Originating Motion No. 13 of 1968]

Land Laws — Foreclosure application — Hearing of — Application to set aside decision of collector refusing postponement of hearing — National Land Code, 1965, ss. 28(2), 37, 260 and 418(3).

This was an application to set aside the decision of the Collector of Land Revenue, Kuala Kangsar, refusing to postpone the hearing of a foreclosure application to a date to be fixed after the final disposal of a suit in the High Court at Ipoh. The main ground of appeal raised by the applicant was that the collector was not competent to adjudicate the rights of the parties in view of the claims made by the applicant in Civil Suit No. 232 of 1967 and therefore the collector was wrong in refusing to postpone the enquiry fixed by him to a date to be fixed until after the suit had been finally heard and decided.

Held, allowing the application: section 37 of the National Land Code states that an appeal shall be against any decision or order given in "any inquiry" and by any standard of interpretation, the words "any inquiry" would include a "proposed inquiry" stated in section 28(2) of the Code and therefore the applicant was entitled to appeal against the refusal of the collector to grant his application under section 28(2) for a postponement of the hearing of the enquiry under section 260 until after the final disposal of the suit.

Case referred to:-

(1) *Suppiah* v. *Ponnampalam* [1963] M.L.J. 202.

ORIGINATING MOTION.

N. Sharma for the applicant.

S. N. Leow for the respondent.

Cur. Adv. Vult.

Pawan Ahmad J: This is an application by Mr. Sharma on behalf of the applicant to set aside the decision of the Collector of Land Revenue, Kuala Kangsar, contained in his letter dated 16th November 1967 refusing to postpone the hearing of Kuala Kangsar Foreclosure Application No. 5/1966 to a date to be fixed after the final disposal of Ipoh High Court Civil Suit No. 232 of 1967.

Briefly, sometime between 1960 and 1964 the applicant executed three charges, namely, Charge Presentation Nos. 2961/60, 5231/61 and 10384/64 on his land held under E.M.R. No. 721 for Lot No. 3379 in the Mukim of Sungei Siput in the district of Kuala Kangsar (hereinafter referred to as the "said land") in favour of the respondent as security for loans made on three separate occasions during that period. Sometime later the respondent filed before the Collector of Land Revenue, Kuala Kangsar, Kuala Kangsar Foreclosure Application No. 5/1966 against the applicant for an order for sale of the said land under section 260 of the National Land Code, 1965.

Subsequent to the filing of the foreclosure application by the respondent, the applicant on 12th May 1967 filed Ipoh High Court Civil Suit No. 232 of 1967 praying for a declaration that the said three charges executed by him on the said land in favour of the respondent are void and unenforceable against the applicant and in addition praying for ancillary reliefs.

On 6th November 1967 the applicant's counsel sent a letter to the collector requesting for a postponement of the hearing of Kuala Kangsar Foreclosure Application No. 5/1966 to a date to be fixed after the final disposal of Ipoh High Court Civil Suit No. 232 of 1967 in view of the allegations raised by the applicant in his statement of claim and because of the judgment of the High Court dated 23rd October 1967. At the same time the collector was also asked for his decision under section 28(2) of the National Land Code. On 16th November 1967 the collector replied saying that as the High Court had not made an order stopping him from hearing the foreclosure application, it would be heard in his office at 10.00 a.m. on 21st December 1967.

The main ground of appeal raised by the applicant is that the collector is not competent to adjudicate the rights of the parties in view of the claims made by the applicant in Ipoh High Court Civil Suit No. 232 of 1967 and therefore the collector was wrong in refusing to postpone the enquiry fixed by him to a date to be fixed until after Ipoh High Court Civil Suit No. 232 of 1967 has been finally heard and decided.

In his statement of claim the applicant seeks to obtain a declaration that the three charges executed by him on his said land in favour of the respondent are void and unenforceable against him because the respondent practised fraud and also because he was not a licensed moneylender during the relevant period. It is the contention of the applicant that by reason of section 69(a), (d) and (g) of the Courts Ordinance 1948, the collector has no jurisdiction to decide on immovable property involving cancellation of instrument or declaratory order raised by the applicant in his statement of claim. The relevant provisions of section 69 of the Courts Ordinance 1948 are as follows:

"69. Sessions Courts shall have no jurisdiction in actions, suits or proceedings of a civil nature —

(a) relating to immovable property except as provided in sections 70 and 71 of this Ordinance;

(d) for the cancellation or rectification of instruments;

(g) for declaratory decrees except in interpleader proceedings under section 73 of this Ordinance."

Further the applicant states that the collector is not competent to determine whether the respondent is a moneylender or not.

On the other hand, Mr. Leow, for the respondent submitted that the collector is competent to hold the enquiry under section 260 of the National Land Code even though questions involving fraud and moneylending have been raised by the applicant and in support of his submission he referred to a passage in "The Torrens System in Malaya" by S. K. Das at page 86 paragraph 3 which states:

"There is divided opinion as to whether a Collector of Land Revenue should be invested with such wide judicial or quasi-judicial powers as at present. He has power to re-enter land for breach of or default in the observance of conditions express or implied in a title (section 37); to order partition of E.M.R. land and award sums for the purpose of equalising the value of the parts (section 106): to entertain a claim to registration as proprietor of a piece of E.M.R. land (section 107), (which may involve the determination of equitable rights and obligations): to order a sale of E.M.R. (or Mining Lease) on a chargee's application for sale (sections 141 and 142), where questions of great complexity may arise under the Moneylenders Ordinance...."

He also referred to another passage from the same book at page 446, last paragraph which reads:

"The court or the collector must satisfy himself that the chargor has made default and must investigate allegations by him as to payments made by him or non-receipt of full consideration or other issues raised by him, such as the invalidity of the charge under the Moneylenders Ordinance, fraud, forgery, illegality, etc.".

He further submitted that as the words contained in sections 256(3) and 263(1) of the National Land Code are more or less similar and since section 256(3) of the National Land Code confers power on the High Court to deal with applications for sale of land held under registry title involving questions of fraud, illegality, moneylending, etc., then similarly the collector has the same power under section 263(1) of the National Land Code to deal with applications for an order for sale of lands held under E.M.R. involving questions of fraud, illegality, moneylending, etc.

I am however unable to accept the submission of counsel for the respondent on this ground because the Court of Appeal (as it then was) in *Suppiah* v. *Ponnampalam*[1] at page 204 paragraph F states as follows:

"I can, however, find no power which would have enabled him to investigate any allegation of fraud or misrepresentation, and he could not have gone beyond granting a period of delay to enable the party making the allegation to take proceedings for rectification of the register under section 240."

Next, Mr. Leow submitted that section 37 of the National Land Code does not permit an appeal against the decision of the collector for refusing an application for a postponement under section 28(2) of the National Land Code because section 28 of the National Land Code merely speaks of a "proposed enquiry" whereas section 37 of the National Land Code speaks of an "enquiry". It is his contention that section 37 of the National Land Code only permits an appeal against the decision of the collector made under section 29 of the National Land Code. He further contended that the refusal by the collector to grant the postponement was an administrative act by him in the exercise of his discretion and as such the court will not interfere with it unless it was wrongly exercised in law.

Section 37 of the National Land Code however states that an appeal shall be against any decision or order given in "any enquiry" and by any standard of interpretation I would say the words "any enquiry" would include a "proposed enquiry" stated in section 28(2) of the National Land Code and therefore the applicant is entitled to appeal against the refusal of the collector to grant his application under section 28(2) of the National Land Code for a postponement of the hearing of the enquiry under section 260 of the National Land Code until after the final disposal of Ipoh High Court Civil Suit No. 232 of 1967.

Further the collector has not given any decision for refusing the application other than to say that the court has not made an order stopping him from holding the enquiry. "Decision" in this case is defined in section 418(3) of the National Land Code to include any act, omission, refusal, direction or order. Lastly, I think it is also in the interest of justice that the enquiry should be postponed until after the final disposal of the High Court suit.

The application is therefore allowed with costs.

Application allowed.

Solicitors: *N. Sharma; S. N. Leow.*

GUI HOI CHAM & ORS. v. PUBLIC PROSECUTOR

[F.C. (Ong C.J. (Malaya), Suffian F.J. & Abdul Aziz J.) April 25, 1969]

[Ipoh — Federal Court Criminal Appeal No. X. 17 of 1968]

Penal Code, ss. 34 & 302 — Common intention to commit culpable homicide not amounting to murder — Adequacy of direction to jury — Non-direction — Effect of — Conviction under s. 326 substituted.

Criminal Law and Procedure — Alibi — Defence of — Direction to jury.

The appellants were tried on the following charge: "That you all on 3rd day of January, 1968 at about 5.00 p.m. at 12 m.s. Simpang Goring, Durian Tunggal, in the District of Alor Gajah, in the State of Malacca, in furtherance of the common intention of you all, did commit murder by causing the death of one Low Ah Bah (male) and by reason of section 34 of the Penal Code committed an offence punishable under section 302 of the Penal Code." The first three were convicted of culpable homicide not amounting to murder on the unanimous verdict of the jury and the fourth by a majority of 5 to 2. Each was sentenced to 8 years' imprisonment. They appealed against conviction as well as sentence.

At the trial learned counsel for the defence both in cross-examination and in his address, had made it quite clear that the defence was that there was a fight between two factions and that it was an incredible coincidence for six persons to gather together at the scene of the fight unless they had gone there for a common purpose. The material issue in the appeal was whether the directions given to the jury in the summing-up adequately presented facts which might be regarded as favourable to the case for the defence. As to the fourth appellant, his defence was an *alibi*, supported by his employer, whose evidence was not shaken in cross-examination.